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Jonathan Miller
Secretary

December 2, 2010

No. 10-27

Greg S. Utterback
Chief Development Officer
Satellite Tracking of People, LLC
1212 North Post Oak Road, Suite 100
Houston, TX 77055

RE: Determination of Protest: RFP 758 1000000252 (Home Incarceration Program – Electronic Monitoring).

Dear Mr. Utterback:

The Finance & Administration Cabinet (the “Finance Cabinet”) is in receipt of your letter of protest to the award of RFP 758 1000000252 for Home Incarceration Program – Electronic Monitoring (the “RFP”). In the protest you contend that the proposal of Satellite Tracking of People, LLC (“STOP”) was not properly considered. For the reasons stated herein, this protest is denied.

FACTUAL BACKGROUND

The Finance Cabinet Office of Procurement Services (“OPS”) issued the RFP on February 22, 2010, on behalf of the Kentucky Department of Corrections. The RFP was modified three times. The RFP closed on March 31, 2010. The RFP sought proposals for continuous electronic monitoring equipment and service. RFP, Section 10.000. The RFP consisted of two sections; (1) the Technical Proposal and (2) the Cost Proposal. STOP submitted a proposal in response to the RFP.

After an evaluation, a contract was awarded on August 6, 2010 to Leimac Contracting, LLC (“Leimac”). STOP submitted an Open Records Request to the Finance Cabinet on August 16th. The Finance Cabinet provided documents on August 20th. By letter dated September 4, 2009 [sic] (and filed on August 24, 2010), STOP filed a written protest. On August 30th, Leimac’s counsel responded to the protest. On October 29, 2010, OPS submitted a written response to the protest.

DETERMINATION

After a review of the solicitation, the solicitation responses, the official findings, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet (“Secretary”) finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary. KRS 45A.285. STOP was an actual offeror to the RFP so it has standing to protest the award.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. For purposes of computing the fourteen (14) calendar day deadline for the submission of a protest, the following legal presumptions apply:

(a) For protests based upon alleged improprieties in a solicitation for bids or proposals which relate to the solicitation documents themselves, the facts giving rise to the protest shall be presumed to have been known to the protestor on the date the solicitation, or a modification to it, was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1) (a).

(b) For protests based upon alleged improprieties in the award of a contract, the facts giving rise to the protest shall be presumed to have been known to the protestor on the date the contract award was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1).

A legal presumption is a fact assumed from the specific circumstances. The legal presumption in this case may be overcome upon presentation of evidence showing that the facts giving rise to the protest were not and could not have been known to the protestor on the date presumed by the regulation. 200 KAR 5:380 (1). The inquiry about when the protestor “knew or should have known” the factual basis giving rise to the protest is guided therefore by the (1) availability of the relevant facts and (2) the protestor’s diligence to uncover those facts. *Matter of: Air Masters Corporation*, 92-2 CPD ¶299 (Comp.Gen. 1992) (protester must diligently pursue information that forms the basis of protest); *Warren Elec. Constr. Corp.*, 90-2 CPD ¶34. (Comp.Gen. 1990) (protester has an affirmative obligation to seek the information that forms its basis of protest).

In this case, a contract was awarded on August 6, 2010. STOP submitted an Open Records Request to the Finance Cabinet on August 16th. The Finance cabinet provided documents on August 20th. STOP’s protest was filed on August 24th. The Secretary finds that the protest was filed within 2 calendar weeks of the date the protestor knew or should have known of the grounds for protest. This protest, accordingly, is timely.

This RFP was a “competitive negotiation” procurement conducted under 45A.085. The hallmark of “competitive negotiation” is discretion. Under the “competitive negotiation” scheme, a contract may be awarded “to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals.” KRS 45A.085(6). The competitive negotiation process is intended to offer the buying agency more flexibility in drafting the content of the solicitation document and more flexibility in evaluating the resulting

offerors. See, e.g., *Matter of: A & C Building and Industrial Maintenance Corporation* 88-1 CPD ¶451 (Comp.Gen. 1988).

The award of a negotiated procurement is a discretionary act by an agency. See *Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005); *Hensley v. City of Russell*, 2006 WL 2988174 (the award of a public contract is a purely discretionary act). The limits of discretion are not boundless, however; agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law will be overturned. See *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

The protester bears the burden of proof. See *Matter of: American Identification Products, Inc.*, 87-2 CPD ¶42 (Comp.Gen 1987) (“protester has burden of demonstrating the merits of its case.”); *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 782-83 (Fed.Cl. 1997); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998). The burden is not met by the protester's mere disagreement with the agency's determination. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). Moreover, a determination by an agency is entitled to a presumption of correctness. KRS 45A.280. The protestor must demonstrate the agency's action was arbitrary, capricious, or contrary to law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007). The Secretary will only intervene only when it is clear that the agency's determination was irrational or unreasonable. *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). An “alternative interpretation” of the terms of the solicitation will not establish an arbitrary or capricious determination. *Laboratory Corporation of America v. Rudolph*, 184 S.W.3d 68, 74 (Ky. App. 2006). In sum, the Secretary will not substitute his judgment on such matters reserved to the discretion of the agency. See *Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005) (award of a negotiated procurement is a discretionary act by an agency); *Hensley v. City of Russell*, 2006 WL 2988174 (award of a public contract is a purely discretionary act).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Accordingly, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examines whether the error was prejudicial to the protestor.

In its letter of protest, STOP raises the following issues:

1. Master Agreement Pricing.

For its first ground of protest, STOP argues:

In the negotiated Master Agreement, Leimac was allowed to include additional pricing for "up to twenty (20) special hook ups shall be provided by the

Contractor at no cost to the Kentucky Department of Corrections," 'this pricing was not included in. its original Cost Proposal nor in the Kentucky Department of Corrections' (KDOC) pricing evaluation spreadsheet. The result of allowing Leimac to negotiate and/or offer pricing for additional installations gave the vendor an unfair advantage not offered to other submitting vendors.

OPS responds:

Section 90.000 states "The Commonwealth reserves the right pursuant to KRS 45A.085 to negotiate a contract with the top-ranked Vendor." Section 90.010 states "Terms and conditions that may be negotiated at the sole discretion of the Commonwealth include but are not limit to issues related to the Technical and/or Cost Proposals."

In a competitive negotiation procurement, pursuant to KRS 45A.085, the Commonwealth initially selects the highest scored respondent pursuant to the RFP. Once selected, the Commonwealth is authorized to negotiate the terms of a potential contract with that highest ranked respondent. Said negotiation may include terms and conditions that are not specifically stated in the RFP but relate to the implementation of the contract based on the needs of the requesting agency and the best interests of the Commonwealth.

Thus, as the original RFP allowed for negotiation and that the protester bears the burden of proof, *See Matter of: American Identification Products, Inc.*, 87-2 CPD ¶42 (Comp.Gen 1987) ("protester has burden of demonstrating the merits of its case."); *GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 782-83 (Fed.Cl. 1997); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998), STOP has failed to show that the award was arbitrary, capricious, or contrary to law.

2. Incorrect Cost Proposal Evaluation.

In its second ground of protest, STOP states:

The scoring of the cost proposals was based on evaluation of all three options combined, However, the Master Agreement clearly shows the Commonwealth only intends to utilize the Base Notification pricing. If the initial intention of the Commonwealth was to utilize state employees and contract for the least expensive service, the Cost Proposals should have been evaluated based upon each level of service, and scored independently of each level,

Also, Leimac submitted a revised Cost Proposal as requested by the Ms. Susan Nolan. In this revised Cost Proposal, it did not properly represent the "Price if Lost, Damaged, or Stolen," Leimac indicated there was "No Cost to State [sic]" with \$0.00. However, in its proposal Leimac clearly states that any Lost, Damaged or Stolen equipment above 15% will be charged to the Commonwealth. Leimac received. 25% of the Cost Proposal scoring based upon

misrepresentations because the solicitation required proposing vendors to absorb the cost of up to 15% of Lost, Damaged, or Stolen equipment. All vendors provided this information and provided a price on the Cost Proposal for units above this required quantity. Leimac misrepresented that they were offering all Lost, Damaged,, or Stolen units at no cost to the Commonwealth.

To this, OPS counters:

The scoring of the cost proposal was based on the average price of all three units with 270 points assigned (75% of the total 360 points for the cost proposal) and 90 points assigned for the price if lost, damaged, or stolen (25% of the total 360 points for the cost proposal). The Commonwealth included all units and notifications bid in the Leimac Catalog which is included in the Master Agreement. The Kentucky Department of Corrections may choose whichever unit and notification listed in the Master Agreement. Leimac submitted a Cost Proposal form that states their fee to the Commonwealth for Lost, Damaged or Stolen equipment will be \$0.00. As stated in the Commonwealth response to Question .11 submitted in the second set of questions for RFP 758 1000000252, **"Question #11 from the 2nd set of questions in RFP 758 1000000252 Attachment A Cost Proposal Form: Column "Price if Lost, Damaged, or Stolen"**

Will the state please verify if this is replacement cost per unit over the 15% allowance for lost, damaged or stolen equipment already allowed for the Commonwealth?

Commonwealth's Response:

The cost listed shall reflect what the Department will be responsible for paying if the equipment is lost, damaged, or stolen.

A review of the contract between the Commonwealth and Leimac demonstrates that the Commonwealth will not be responsible for the cost of any replacement equipment. The Secretary finds that OPS properly determined that the Leimac offer was in conformance with, and responsive to, the terms of the RFP and that OPS properly scored the Leimac offer. The agency's determination was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).


Accordingly, upon review of the record, STOP has not demonstrated an error in the procurement. The protest, therefore, must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the

decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

Finance and Administration Cabinet



Jonathan Miller
Secretary

cc: Susan S. Noland, OPS
Jason E. Williams, Counsel for Leimac